

Scotland in the United Kingdom: An Enduring Settlement

Advice Paper 15-02 February 2015

Submitted to:

House of Commons Constitution and Political Reform Committee
Scottish Parliament's Devolution (Further Powers) Committee
Scotland Office
Scottish Government

Summary

- *Considerable further work will be required before the settlement proposed could reasonably be regarded as “enduring”.*
- *Both the UK and the Scottish Parliaments, when considering the legislation giving effect to devolution of further powers to Scotland, will have to consider, not only the implications for Scotland, but also how they will affect England, Wales and Northern Ireland and the cohesion of the Union between them.*
- *There was only limited engagement with civic Scotland, business, other interested parties and independent experts in developing these proposals. The legislative process must allow sufficient time to ensure that they are adequately discussed and tested.*
- *Much greater clarity is required as to the mechanism by which reductions in the block grant calculated under the Barnett formula (or any substitute formula) can be negotiated and agreed between the UK and Scottish governments in an open and transparent manner.*
- *If the principle of ‘no detriment’ between Scotland and the rest of the UK is to underpin the proposed settlement, then it must be defined.*
- *We believe that there is a need for an equivalent body to the Office for Budget Responsibility to be established for Scotland; in addition we recommend the establishment of a new body to provide independent analysis of the fiscal arrangements and balancing mechanisms that will exist between the United Kingdom and the four nations within the UK.*
- *It will be important to ensure that the mix of taxation powers is appropriate and sufficient for the degree of devolved autonomy proposed.*
- *Enactment of the Sewel Convention would require clear definition of the circumstances in which the UK Parliament would be entitled to legislate in relation to devolved matters.*

Introductory comments

1. The Royal Society of Edinburgh (RSE) in partnership with the British Academy (BA) welcomes the opportunity to comment on the scrutiny of the “Scotland in the United Kingdom: An enduring settlement – Draft Scotland Clauses 2015” documentⁱ. This Advice Paper is being submitted to relevant Committees of both the House of Commons and the Scottish Parliament, with copies to both the UK and Scottish Governments.
2. In preparing our comments a Working Group of Fellows of the RSE and/or BA was established. This Working Group comprised of Fellows with relevant expertise in areas including: law; politics; economics; government; and civic society.
3. Our understanding of the intentions of the Smith Commission is that the implementing legislation should:
 - Embed the Scottish devolution settlement in the constitutional framework of the UK.
 - Devolve as much power as could be agreed by the participating parties.
 - Devolve appropriate risk in accordance with additional powers.
 - And to do the above with no adverse risk to the rest of the UK.
4. Two overarching issues emerged from our consideration of the current proposal:
 - a) The process through which it has been developed; and
 - b) The substance of the draft legislation.

Process

5. Both the RSE and the BA are seriously concerned about the time available for consideration, analysis and comment between publication of the Smith Report and publication of these proposals. Although we are aware that the timetable was proposed by the leaders of the pro-Union parties shortly before the Referendum, the process falls well short of the normal UK Government period for consultations. It compares unfavourably with the extensive engagement that took place prior to the establishment of the Scottish Parliament through the Constitutional Convention; and also the extent of public consultation and discussion with witnesses and experts that the Calman Commission undertook before making its proposals. The RSE commented upon this in a submission to the Smith Commission explaining that as a result of the tight deadline we had decided to concentrate on the issue of research funding.ⁱⁱ
6. **This short timeframe risks undermining the aim of achieving “an enduring settlement”. There must be an adequate opportunity for civic society, business, other interested parties and independent experts to consider, analyse and comment upon the implications of the proposals for Scotland and also for the other nations of the United Kingdom.** This does not mean that the passage of new powers to Scotland must await further developments in the constitutional arrangements for other parts of the UK. But it does require that the new settlement for Scotland be acceptable to all of the nations of the UK. It is also essential that the Draft Clauses are adequately tested as a mechanism for implementing the Smith Commission recommendations.
7. The enduring nature of the settlement is in any event under question given the positions adopted by several of the political parties that participated in the Commission. The SNP has been emphatic in its criticism of the Draft Clauses; Labour has indicated an intention to go further, particularly in the devolution of welfare (the ‘Vow Plus’); while the Conservatives are divided on linking further Scottish devolution to English votes for English laws. The outcome of the General Election, and which party or parties form the

next Government, will clearly bear heavily on how the proposals are taken forward and whether there are any significant changes to the proposals currently being considered.

8. As there is clearly no continuing political consensus on the Smith proposals, even a short period after the Commission reported, it will be all the more important that the legislative outcome is seen to have been reached after adequate and appropriate public and parliamentary consultation and debate. The parliamentary scrutiny at both Westminster and Holyrood after the General Election should be designed to enable expert and informed consideration of the Draft Clauses.

Substance: the future of the block grant

9. Among the issues that the document does not address are difficult technical issues, notably any necessary reform of the Barnett formula, consequent upon the enhanced fiscal devolution; or, if such were proposed, the adoption of an alternative means of calculating the block grant. **It is, in our opinion, essential to the enduring character of the settlement that the future of the block grant is fully resolved.** This must take into account the nature and scope of the new devolved powers, the on-going mechanism for calculation of changes to the block grant, related to the 'no detriment' proposition, and the way in which decisions by either Government will be reflected in future changes to the grant.
10. The current arrangements are extra statutory. In our opinion, consideration must be given to the desirability of making Section 64 of the Scotland Act 1998 (which empowers the Secretary of State to make grants) more explicit so that there is a clear understanding in both Governments, *and also among the public*, of where financial responsibilities lie and where and by whom risks should be borne.
11. At minimum, there must be a clear mechanism through which the UK Government and Scottish Government negotiate and agree the reduction to the block grant in an open and transparent manner. We believe that there is a strong case for the establishment of an independent, impartial body to consider the amount of, and adjustments to, the block grant. This would be in addition to an enhanced independent body in Scotland, with powers and capacities comparable to those of the OBR, as referred to below. It is certainly not acceptable for HM Treasury (an organ of the UK Government) to make such decisions unilaterally.
12. The Smith Commission Agreement recognises in Paragraph 95 (3) that, on initial devolution of further powers, there should be "no detriment" to the Scottish or UK Governments' budgets. In Paragraph 95 (4) Smith also states that "no detriment" should result from post-devolution policy decisions. We believe that there is a need for a comprehensive and independent analysis of how that and similar conceptions would apply into the future in relation to the powers conferred by the Scotland Act 2012 and to those now proposed a result of the recommendations of the Smith Agreement.
13. The UK Government has already established the Office for Budget Responsibility and, as the RSE has recommended before, we believe that there is a need for a body with powers and capacities comparable to those of the OBR to be established in Scotland.
14. Overarching these bodies should be a new organisation, to provide independent analysis across all four nations, which has the responsibility to examine the agreed fiscal arrangements and balancing mechanisms across the United Kingdom.
15. Both the new Scottish body and the UK wide body should be free to review fiscal arrangements and publish recommendations independent from any of the Governments.

Substance: the principle of 'no detriment'

16. **If the principle of 'no detriment' between Scotland and the rest of the UK is to underpin the proposed settlement, there must be a clearer understanding of what it means and precisely how and by whom this is to be interpreted.** Whether it is to be by a constitutional convention or in some fashion enshrined in legislation, greater clarity is important to ensure the enduring character of the current arrangement for further devolution. There are many areas where decisions taken in one nation of the UK may impact upon one or more of the other nations.
17. In addition to greater clarity of understanding as to the aim, a clear set of processes to deal with such situations is essential to reduce the likelihood of ongoing disputes or grievances and to provide a mechanism for their resolution where they arise.

Substance: tax and welfare

18. If the proposals are accepted broadly as set out, then Scotland will become one of the most devolved nations in the world in revenue raising terms, including the full devolution of personal income tax and the assignment of half of Value Added Tax. Nevertheless, it will depend on a narrower basket of taxes than is usually the case where such a degree of autonomy exists. Consideration therefore needs to be given to how the need for additional resources in a crisis would be met.
19. Initially the response to the need for additional resources in a crisis would be likely to be met from borrowing. However, the narrow basket of taxes available to the Scottish Government would mean that personal income tax would be the prime tax available to support the financing of any additional borrowing or support any new policy initiative. Some other taxes already fall within the remit of the Scottish Parliament, such as Council Tax, Business Rates and the new Land and Buildings Transaction Tax. But Corporation Tax would remain a UK reserved power and there would be no possibility, under EU rules, to vary the rate of VAT, which must be the same within a single member state – in this case the UK.
20. In circumstances where an economic crisis affected all or much of the United Kingdom, Scotland would be protected by use of the full range of powers available to the UK Government. We assume that a major economic shock that primarily affected Scotland would also be addressed by fiscal transfer within the UK as the block grant would be unaffected by it, but there needs to be clarity of understanding as to how and in what circumstances this could be expected.
21. Given that Scotland would have increased powers on welfare, it may be appropriate to include some powers in relation to National Insurance (NI). Although, as currently structured, NI acts as a regressive tax on the employee side at income levels above the Upper Income Limit, it does also have the advantage of providing a further taxation lever relating to business in Scotland. If a proportion of National Insurance were to be devolved this could open the corresponding opportunity to retain a larger proportion of income tax than is currently planned within the responsibilities of the UK Parliament. As the Smith Commission notes its proposals do not prevent the UK government from levying any UK wide tax if this is in the national interest but the retention of an explicit UK power over income tax would make it clear that this could potentially be used to respond to a future UK wide crisis or emergency.
22. The partial devolution of welfare and tax powers will clearly lead to significant complexities of responsibility, the sharing of risk and the principle of 'no detriment'. This is illustrated, for example, by the proposed mix of housing provision since the delivery of social housing (and planning for housing in general) would rest with the Scottish Government while housing benefit provision remained a reserved issue. The processes through which complexities and conflicts can be settled would be significantly stronger if the legislation that delivers further devolution in Scotland were underpinned by an agreed set of fundamental principles.

23. Also, Universal Credit is enshrined in the proposals as a reserved issue, being a current policy initiative of the current UK Government. Nevertheless, it is difficult to see on what principle all aspects of this current policy must be entrenched in such a manner. In particular, it would seem logical to us that serious consideration should be given for the Scottish Government also to have responsibility for Housing Benefit.
24. **In summary, if it is important to pool economic risk and opportunity, it is also important not to detach the consideration of tax and welfare powers from the corresponding responsibilities. The Committees of both the House of Commons and the Scottish Parliament should consider whether the tax powers proposed are appropriate for the economic and social security responsibilities.**

Substance: Constitutional Arrangements

25. Section 1 (a)ⁱⁱⁱ – rather than add a new section, it would be more appropriate that Section 1 should be amended to read ‘There shall be a Scottish Parliament constituting a permanent part of the UK constitution’.
26. With regard to the Sewel Convention (proposed new subsection 28(8)), constitutional convention may, in practice, be stronger than statute, as statute can be repealed. However, if the legislation is to put the Sewel Convention on a statutory footing, it is insufficient to state that the UK Parliament would not ‘normally’ legislate in areas devolved to Scotland since that can only give rise to legal uncertainty.
27. Two quite different situations must be provided for if the Sewel Convention is to be put on a statutory footing.
28. The first is where, as at present, it is accepted as convenient and appropriate, from the point of view both of Westminster and Holyrood, that legislation affecting a devolved matter be passed by Westminster. The procedure of the Legislative Consent Motion has been adopted to deal with this and it seems to work well.
29. The second situation would be one where ‘abnormal’ or exceptional circumstances arise – for example, a state of war or national emergency (economic, environmental or disease) - in which the UK Parliament would be entitled, *without the consent of the Scottish Parliament*, to legislate on devolved matters.
30. Section 4 (2) 30A^{iv}. The provisions requiring a “super-majority” are welcome and desirable particularly for decisions relating to the electoral system for the Scottish Parliament as proposed in the Draft Clauses.

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ⁱhttps://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf

ⁱⁱ <http://www.royalsoced.org.uk/news/news.php?id=261>

ⁱⁱⁱ Scotland in the United Kingdom Draft Clauses

^{iv} Scotland in the United Kingdom Draft Clauses